APPEAL NO. 010255

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). A contested case hearing (CCH) was held on October 11, 2000, with the record closing on January 22, 2001. In regard to the only issue before her, the hearing officer determined that the respondent (claimant) had a 30% impairment rating (IR) as assessed by the designated doctor in a second report.

The appellant (carrier) appealed the decision as being contrary to the great weight and preponderance of the evidence because the designated doctor refused or failed to view a surveillance videotape of the claimant, and asserted that the claimant's IR should be "9% or 11%." The claimant responds, attaching some additional medical reports generated after the CCH and suggesting that his IR is 54% as assessed by the designated doctor in an earlier report. The claimant's response is timely as a response but untimely as an appeal. *See* Section 410.202.

DECISION

Affirmed.

The parties stipulated that the claimant sustained a compensable lumbar spine injury on _____, and that the claimant reached "statutory maximum medical improvement [MMI] on November 28, 1999." The parties also stipulated to a number of medical reports, summarized in the hearing officer's Statement of the Evidence, which occurred prior to the claimant's most recent spinal surgery on July 6, 1999, which consisted of:

> L4 decompressive laminectomy with medial facetectomies L4-L5 and bilateral foraminotomies at the L4-L5 nerve roots, bilateral L4-L5 discectomy and posterior lumbar interbody fusion L4-L5 and posterior segmental spinal fixation with bone screws and plates at L4-L5.

Also at issue is a surveillance videotape, apparently taken on July 11, 2000, which shows the claimant walking to and from a house, and in a field; getting into a vehicle; and carrying a plastic one-gallon jug. The parties stipulated that Dr. E is "the Commission [Texas Workers' Compensation Commission] selected designated doctor" and that Dr. E found the claimant not at MMI on January 14, 1998, and March 8, 1999.

In reports which occurred after the claimant's July 1999 surgery, Dr. A, the claimant's then treating doctor, in a Report of Medical Evaluation (TWCC-69) dated November 29, 1999, and narrative dated November 19, 1999, certified MMI on November 20, 1999 (statutory MMI was November 28, 1999), with an "11% + WP" IR. That rating was calculated as 10% from Table 49 of the Guides to the Evaluation of Permanent Impairment, third edition, second printing, dated February 1989, published by the American Medical Association (AMA Guides) and 1% sensory impairment. A rating for range of

motion (ROM) was deferred until after the claimant "has had rehabilitation measures." Dr. E again evaluated the claimant on January 17, 2000; certified MMI; assessed a 54% IR based on 10% impairment from Table 49, 15% impairment for various loss of ROM, 3% impairment for sensory loss, 22% impairment for motor deficit, and 20% impairment for depression; and used the Combined Values Chart to arrive at a 54% IR. The carrier relies on various record reviews dated January 25, March 22, April 24, and July 20, 2000, by Dr. C to rebut Dr. E's report. Dr. C particularly challenges the 22% motor deficit rating stating that the claimant would be wheelchair bound with that amount of motor deficit and that a bilateral amputee "below the knees yields an impairment of 48%." Dr. E also demanded $1,000.00 to answer the carrier's interrogatories and view the surveillance videotape. In a TWCC-69 of March 7, 2000, and narrative of February 21, 2000, Dr. K, a subsequent treating doctor, certified MMI; assessed a 15% IR based on a 10% impairment from Table 49 (II) (F) of the AMA Guides; and invalidated lumbar flexion and extension based on the straight leg raise, but assessed 3% impairment for right lateral flexion and 2% impairment for left lateral flexion. The carrier, apparently on two occasions, filed motions to disqualify Dr. E and for the appointment of a second designated doctor, the second motion for disqualification was denied by the hearing officer in an order dated September 20, 2000.

The CCH was held on October 11, 2000. On October 26, 2000, the hearing officer advised the parties that she was reopening the CCH to seek clarification from the designated doctor. The hearing officer wrote Dr. E by letter dated October 26, 2000, forwarding reports of Dr. A, Dr. K, and another doctor, and asking Dr. E to view the videotape. Dr. E replied by letter dated October 31, 2000, cautioning about placing too much reliance on the videotape, and commenting:

> The video, not withstanding the above stated parameters, does not change my opinion in any way. I have no comment on the video, other than to say, that it is certainly a video, and that I don't even know that I recognize the individual involved. I would certainly not make any type of decision, based upon the video. I think any one that does, is certainly ill-advised.
>
> . . . . If you wish for me to re-examine the patient, I would be happy to do so, but I feel that this is the only appropriate way to possibly, if any, change my opinion as to his permanent physical impairment.

The hearing officer, by letter dated November 17, 2000, requested that Dr. E reexamine the claimant; instructed Dr. E not to consider depression as the stipulated injury only included a lumbar spine injury; and commented:

> It is clear from the video that the Claimant faked the seriousness of his condition when you examined him. I prevail upon you to view the video in conjunction with your reexamination of the Claimant. Should you once again refuse to view the video then please explain to me in detail why you feel the information contained in the video it [sic] is not medically relevant. Especially considering the fact that the video depicted the Claimant getting in and out

of his vehicle without difficulty and further he was noted to ambulate normally.

Dr. E, in a TWCC-69 and narrative both dated December 4, 2000, certified MMI and assessed a 30% IR. Although Dr. E is quite clear that in his medical opinion the claimant's depression is injury-related, he did not include it in the IR, which was based on 10% impairment from Table 49 (II) (E) of the AMA Guides; 12% impairment for loss of ROM; 3% impairment for sensory impairment; and 9% impairment for motor deficit combined in the Combined Values Chart for a 30% IR. Dr. E did not comment on the videotape one way or the other. Both parties were allowed to, and did, comment on Dr. E's December 4, 2000, report.

The hearing officer, in her Statement of the Evidence, cites an Appeals Panel decision and comments that a videotape does not "constitute medical evidence necessary to overcome the presumptive weight of the designated doctor's report." We note that in the case cited by the hearing officer, unlike the present case, the videotape was not sent to the designated doctor and was only used at the CCH in an effort to rebut the designated doctor's report and we said that only medical evidence can overcome the presumptive weight of the designated doctor's report. The hearing officer found:

FINDING OF FACT

2. The [IR] assigned by [Dr. E] on December 4, 2000, is entitled to presumptive weight beause he assigned an [IR] only for the affected body parts, it addresses the questions made to the designated doctor by the Hearing Officer, and because his failure to view evidence provided by this Hearing Officer, specifically a video, does not constitute the medical evidence necessary to overcome the presumptive weight of the designated doctor's report.

We believe the hearing officer's reliance on the case she cites is misplaced; however, we are uncertain, based on Dr. E's October 31, 2000, letter, that, in fact, he had not viewed the videotape. What is amply clear is that Dr. E did not rely on the videotape in assessing his IR. We cannot say that the hearing officer erred in according Dr. E's December 4, 2000, report presumptive weight although we are not convinced that Dr. E had in fact failed to view the videotape.

Our review of the evidence does not lead us to the conclusion that the hearing officer's decision is so against the great weight and preponderance of the evidence as to be clearly wrong and manifestly unjust. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986).

Accordingly, the hearing officer's decision and order are affirmed.

Thomas A. Knapp
Appeals Judge

CONCUR:

Judy L. S. Barnes
Appeals Judge

CONCURRING OPINION:

I concur in the result. I write separately to state my opinion that the hearing officer erred in finding that Dr. E did not view the videotape and I would reverse so much of Finding of Fact No. 2 as references Dr. E's "failure to view evidence, provided by this Hearing Officer, specifically a video . . . ." Not only does Dr. E state in his October 31, 2000, letter, that the video does not change his opinion and that he has no comment on the video, but he also states: "I don't even know that I recognize the individual involved." In my view, while the former comments may be ambiguous, the quoted statement does not admit of any reasonable inference other than the inference that Dr. E did, in fact, view the video. I would also caution that while, in this case, the video may not have constituted medical evidence sufficient to overcome the presumptive weight of Dr. E's report, under other circumstances a videotape of a claimant may well constitute medical evidence if it is incorporated into a doctor's clinical judgment.

Philip F. O'Neill
Appeals Judge